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IN THE

Supreme Court of the United States

October Term, 1969

No. 830

FRANK CHAMBERS,
Petitioner,

v.

JAMES F. MARONEY, Superintendent, State Correctional Institution at Pittsburgh, Pennsylvania,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinions Below

The opinion of the District Court (A. 308-315, inclusive) is reported at 281 F. Supp. 96 (W. D. Pa. 1968). The opinion of the Court of Appeals (A. 320-336, inclusive) is reported at 408 F. 2d 1186 (3rd Cir. 1969).

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit (No. 17219) was entered on January 22, 1969. A petition for writ of certiorari, in forma pauperis, was filed before your Honorable Court on March 25, 1969 at No. 1781 Misc., October Term, 1968. The An-

swer to Petition of Certiorari and Brief for Respondent were filed on July 14, 1969. The writ was granted on November 10, 1969. The jurisdiction of this court rests upon 28 U. S. C. 1254 (1).

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

I. Whether the petitioner was deprived of the effective assistance of counsel at trial where the record reveals affirmative proof beyond a reasonable doubt that petitioner was not prejudiced by the late appointment of counsel?

II. Whether the search of the automobile in which petitioner was an occupant was reasonable since it was conducted incident to a lawful arrest though momentarily later at a place which provided safe conditions for police officers?

III. Whether the admission into evidence of revolver shells seized in petitioner's apartment during a search conducted pursuant to a warrant which did not list shells as being among the items to be seized was legal or alternatively, constituted harmless error?

Counter-Statement of the Case

A. The Circumstances of the Criminal Conviction.

Petitioner was indicted at No. 78 June Sessions 1963 and at No. 91 June Sessions 1963, in the Court of Oyer & Terminer of Allegheny County, Pennsylvania. Each indictment set forth the charges of armed robbery and receiving stolen goods. Petitioner entered a plea of not guilty and was represented by court-appointed counsel Vincent Tamburo, Esq., of the Legal Aid Society. On September 27, 1963, trial was commenced before Judge J. Frank Graff, Specially Presiding, and a jury. The jury found petitioner guilty as to both indictments. Judge Graff sentenced petitioner at No. 78 June Sessions 1963, to undergo a term of imprisonment of not less than four or more than eight years. This sentence was to be served concurrently with the sentence previously imposed at No. 58 June Sessions 1963. At No.

91 June Sessions 1963, Judge Graff sentenced petitioner to undergo a term of imprisonment of not less than two or more than seven years. This sentence was to be served consecutively to the sentence imposed at No. 78 June Sessions 1963.

No direct appeal was taken to the appellate courts of Pennsylvania.

The facts of these crimes may be briefly and accurately summarized as follows:

(1) Indictment at 78 June Sessions 1963; armed robbery (first count); receiving stolen goods (second count).

Raymond Havicon, Manager of a Boron Oil Company Service Station in Turtle Creek, Pennsylvania, testified that at approximately 2:20 A. M. on May 13, 1963, two colored men entered the office of the station and requested change to purchase a package of cigarettes. When he had given them change, one of the men drew a revolver and demanded that the witness give them more money. The robbers then forced the witness to remove his trousers and to go into the back room (A. 20). The robbers fled, taking $66.00 and Mr. Havicon's driver's license, registration card and various other cards (A. 21). Mr. Havicon was a former police officer and recognized the revolver as being a .38-caliber revolver which he identified at trial (A. 22). He also identified the various cards which had been taken from him (A. 23). The witness positively identified petitioner as the robber who drew the revolver (A. 23). Mr. Havicon testified that he had seen the petitioner for approximately "2 to 3 minutes" and that he had previously identified petitioner in another trial and in the police lineup (A. 30).

Joseph Reddington, a McKeesport police officer, testified that petitioner had been delivered into the custody of the McKeesport police by North Braddock police (A. 36).

(2) Indictment at 91 June Sessions 1963; Armed Robbery (first count); Receiving Stolen Goods (second count).

Stephen Kovacich, an employee of a Gulf Service Station in North Braddock, testified that at approximately 11:45 P. M. on May 20, 1963, two men approached the station and forced him to go into the office (A. 54). Both of these men were armed with revolvers. The witness gave the robbers a quantity of change which he had placed in a single righthand glove (A. 55). The witness identified the revolvers and the glove at trial (A. 56). He also stated that one of the robbers was wearing a green sweater and the other a light trench coat (A. 57). The robbers fled, taking with them $48.00 (A. 58). Although this witness had identified petitioner as one of the robbers the day after the robbery (A. 59), he was unable to identify petitioner at trial because he was new wearing glasses, different clothes and had shaved off his mustache (A. 59).

Linda Oschinick, 14 years of age, testified that she and a friend, Jerry Klaus, were walking in the neighborhood of this Gulf station on May 20, 1963, at approximately 12:00 A. M. and noticed a blue station wagon, with four colored men occupying it, parked in a Kroger's parking lot near to the service station (A. 39). She stated that she had seen this station wagon circling the block, where the Gulf Service Station was located, five or six times. She was unable to identify petitioner as one of the robbers, but stated that one of the men she had seen in the blue station wagon was wearing a light trench coat and that another was wearing a green sweater (A. 43).

Jerry Klaus, 17 years of age, who had been in the company of Linda when she had seen the blue station wagon, confirmed her testimony. He further testified that he learned of the robbery of the Gulf Service Station immediately after it occurred and then observed a blue station wagon leaving the Kroger parking lot where he had previously noticed it parked, at approximately "forty-five or fifty m. p. h." (A. 52).

North Braddock Police Officers arrived at the scene of the crime at 11:52 P. M., obtained descriptions of the robbers and their car, and immediately broadcasted this description by police radio (A. 84).

Lee Herman and Hugh Hagan, Swissvale Police Officers, testified that they stopped a blue station wagon at approximately 12:30 A. M., May 21, 1963, at the request of the North Braddock Police (A. 71-72). Petitioner was an occupant of this automobile (TT. 101). Swissvale and North Braddock are located in the same part of Allegheny County.

Theodore Wagner, a North Braddock Police Officer, testified that when he arrived at the scene of the arrest petitioner was wearing a green sweater (A. 85). The officer escourted petitioner and a co-defendant in the light blue station wagon to the North Braddock police station (A. 87). The defendants were then searched (A. 87). They were questioned and the automobile was searched. During the course of this search, officers discovered the revolvers used in the robbery and the glove full of change hidden in a vent under the dashboard (A. 90). The officers also found the cards which had been stolen from Raymond Havicon in the Boron service station robbery the preceding week (A. 91). Charles Cassidy, another North Braddock police

officer, confirmed Officer Wagner's testimony regarding the search (A. 107).

Petitioner had $46.00 on his person when he was arrested (A. 92). Petitioner refused to answer the officer's questions (A. 93). Officer Wagner also testified that petitioner looked different at the arrest than he did at trial (A. 93-94). Guy Cicco, a North Braddock Officer, testified that petitioner denied participating in this robbery (A. 117).

James Heverley, another North Braddock Officer, testified over the objection of petitioner's counsel (A. 127), that when petitioner's home was searched, .38-caliber bullets were found (A. 127). On cross examination, Officer Heverley admitted that the search warrant for petitioner's residence did not mention bullets and that the officers did not know that they would find bullets in petitioner's home (A. 132). These bullets were admitted into evidence.

B. Collateral Attack in the State Courts.

Petitioner made application for habeas corpus relief in the Court of Common Pleas of Allegheny County, Pennsylvania. The allegations of the petition were that:

(1) A search of the car was illegal in that the officers had no search warrant and that the search was remote.

(2) The search warrant for his residence was defective as it did not describe, with particularity, the property the officers expected to find.

(3) He was denied a fair trial in that he was convicted of both armed robbery and receiving stolen goods.

(4) Because of the "belated appointment" of his court-appointed counsel, said counsel was ineffective.

F. Peter Dixon, Esq., was appointed to represent petitioner and he filed amendments to the petition contending

that petitioner had been arrested without probable cause, and that the introduction of evidence found in petitioner's home was illegal in that the search warrant was invalid.

At the hearing on May 13, 1966, before Judge Graff, petitioner testified that the car in which he was arrested belonged to his companion, Mr. Lawson (A. 259). Petitioner testified that he had first seen Mr. Tamburo, his trial counsel, just prior to the commencement of his trial (A. 256). At this hearing, Mr. Dixon indicated that petitioner was abandoning the contention that his trial counsel was ineffective. He stated that the only reason he had questioned the petitioner on this point was to counter the District Attorney's contention that petitioner was not entitled to collateral relief as he had failed to file a timely suppression motion (A. 258).

Judge Graff dismissed the petition as being without merit. The Superior Court of Pennsylvania affirmed the Order of the lower court in a per curiam opinion: *Commonwealth ex rel. Chambers v. Duggan*, 210 Pa. 718, 231 A. 2d 425 (1967). The Supreme Court of Pennsylvania denied allocatur at No. 2193A Miscellaneous Docket. Petitioner raised the same issues on appeal as he had in the lower court.

C. Collateral Attack in the Federal Courts.

In his petition for writ of habeas corpus at No. 67-1050, appellant alleged that:

1. There was no probable cause for his arrest;
2. There was no search warrant for the search of the car in which he was arrested;
3. The evidence seized in his apartment pursuant to a search warrant was not named in the warrant and was therefore not properly introduced into evidence at his trial;

4. Trial counsel was inadequate because of his belated appointment.

A hearing was held on December 4, 1967 at which time the records of the proceedings in the state courts were introduced into evidence. On the basis of these records, Judge Marsh dismissed the petition.

On March 6, 1967, Judge Marsh granted a Certificate of Probable Cause to Appeal. On January 22, 1969, the United States Court of Appeals for the Third Circuit affirmed the order of the District Court at No. 17219.

Summary of Argument

I.

Petitioner's right to the effective assistance of counsel was not denied even though he first met his appointed counsel on the morning of trial.

A. The Circuit Court of Appeals was correct in holding that the tardy appointment of legal counsel raised the prima facie presumption of ineffective counsel. In addition, the Circuit Court correctly permitted the Commonwealth to rebut that presumption by adequate affirmative proof from the trial record that no actual prejudice resulted. In adopting the adequate affirmative proof test, the Court of Appeals in effect applied the same standard that your Honorable Court set forth in *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824 (1967), the harmless error rule. Since a thorough review of the evidence upon which petitioner's conviction was based did not uncover any prejudice because his counsel was belatedly appointed, the Circuit Court correctly denied petitioner's claim without an evidentiary hearing.

B. Assuming arguendo that the Court of Appeals adopted the proper standard of proof, the Court of Appeals correctly held that an examination of the trial record supported the District Court's finding that no actual prejudice resulted. Petitioner's arguments that his counsel was precluded from filing essential pre-trial motions to suppress evidence are without merit since his counsel was able to object at trial and the District Court and Circuit Court specifically reviewed this challenged evidence to determine its admissibility. Both the District Court and the Circuit Court found that the evidence was properly admitted. The allegation of actual prejudice is without merit since petitioner is unable to support the allegation in the record.

II.

The search of the automobile in which petitioner was an occupant was reasonable since it was conducted incident to a lawful arrest though momentarily later at a place which provided safe conditions for police officers. The trial court did not err in admitting into evidence instrumentalities and fruits of the crime which were found within the automobile.

A. The record shows that the arresting police officers had sufficient probable cause to arrest petitioner. Petitioner's physical coloring and attire matched perfectly the description given by the holdup victim. The car in which the petitioner was riding when apprehended fit the description given of an automobile which was seen circling the area of the robbery many times at the time of the robbery and which left a parking lot across the street from the robbery at a high rate of speed immediately after the robbery. The description of one of the occupants of this automobile matched petitioner's description and a

further description of the second robber and one of the automobile's occupants matched one of the occupants of the automobile in which petitioner was apprehended. In addition, the apprehended vehicle attempted to elude police officers.

B. The search and seizure of items from the automobile was conducted incident to the lawful arrest. The arrest occurred at a dimly lit parking lot at approximately 12:30 A. M. The automobile was not searched until it had been driven to the police station by one of the petitioner's co-defendants. The search was reasonable because it took place substantially at the time of the arrest and emergency circumstances necessitated that the search be held at a well-lighted area which was safe for police officers.

III.

The trial court correctly admitted into evidence bullets taken from petitioner's home during a search conducted pursuant to a valid warrant. Alternatively, if the admission is held to be error, it is merely harmless error. Even though the search warrant did not specifically list shells as being the items to be located, the police officers correctly seized the .38 caliber bullets since these bullets were intimately related to the offenses charged, armed robberies. The guns previously located in the car in which petitioner was a passenger were .38 caliber revolvers. If error, the admission of the bullets is merely harmless error since there was overwhelming evidence of petitioner's guilt, including eye-witness identification of the petitioner and the admission of the instrumentalities and fruits of the crime found in petitioner's possession.

ARGUMENT

I. The Petitioner was not Deprived of the Effective Assistance of Counsel at Trial where the Record Reveals Affirmative Proof Beyond a Reasonable Doubt that Petitioner was not Prejudiced by the Late Appointment of Counsel.

A. The Circuit Court did not err in holding that the Commonwealth could rebut petitioner's presumption of ineffective assistance of counsel from the belated appointment of counsel by a showing by adequate affirmative proof that petitioner was not actually prejudiced.

Petitioner alleges that the mere potentiality of prejudice from the belated appointment of counsel mandates the reversal of his conviction. Petitioner cites numerous cases in which your Honorable Court effectuated the Sixth Amendment's right to counsel provision. Further, petitioner enumerates several alleged failures by his trial counsel to file pre-trial motions to suppress evidence and to assert at trial timely objections to the admission of evidence in an effort to prove that actual prejudice occurred.

The Commonwealth denies that the mere potentiality of prejudice warrants reversal and contends that the Circuit Court applied the proper standard of proof in determining whether in actuality the petitioner was prejudiced. While the Commonwealth agrees with the holding of the Circuit Court[1] that the tardy appointment of legal counsel raised the prime facie presumption of ineffective counsel herein, the Commonwelath contends that the record clearly rebuts the allegation of ineffective assistance of counsel.

Initially, the Commonwealth avers that while petitioner met his court-appointed counsel, Vincent Tamburo, Esq.

[1] The opinion of the District Court does not specifically deal with this question, possibly because petitioner's counsel at the State habeas corpus hearing abandoned this contention.

of the Legal Aid Society, in the hallway adjoining the courtroom on the morning of trial, the record shows that defense counsel had been appointed to represent petitioner on these charges on some prior date. While petitioner was lodged in the Allegheny County Jail in the five-month period prior to trial, he was apparently visited by a representative of the Legal Aid Society (A. 258). Three weeks prior to the trial now in question petitioner was represented by Legal Aid Attorney Middleman at a trial on these same charges which ended in a mistrial. It can be presumed that Mr. Tamburo had access to any investigatory files of the Legal Aid Society and to the trial notes of Mr. Middleman. Indeed, Mr. Tamburo's arguments at trial clearly indicate that he was familiar with the facts of petitioner's case (A. 82-83).

Since petitioner's counsel at the state habeas corpus hearing abandoned the contention of ineffective assistance of counsel[2] and the Commonwealth did not therefore offer the testimony of Mr. Tamburo,[3] no other facts are available to determine the amount and the quality of the preparation for trial pursued by Mr. Tamburo or the amount of evidentiary material known by and available to him in determining what, if any, evidentiary objections were mandated or what, if any, defenses were available to petitioner.

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[2] Because of the serious constitutional challenge which this problem presents and which was recognized by the Circuit Court, the Commonwealth will abandon any previously raised contention that procedurally the issue is not properly before your Honorable Court.

[3] In its Answer to the Petition for Writ of Habeas Corpus in the State Court proceeding, the Commonwealth alleged that:

> Mr. Tamburo, his counsel, was a member of the Legal Aid Society. The Legal Aid Society was named long before the date of the trial to represent this petitioner. It had been the practice of the Legal Aid Society to send one of its investigators to interview those whom they were appointed to represent. In this case, the Legal Aid Society would send an investigator to interview the petitioner, they would secure all the facts in connection with these charges. These facts were reduced to writing in a written report, and this report was turned over to Mr. Tamburo (A. 294).

To the knowledge of the Commonwealth, your Honorable Court has never ruled upon the procedural steps utilized in the State Courts or in the Federal District Courts to determine whether a belated appointment of counsel necessitates the reversal of conviction.[4] The Commonwealth respectfully suggests that the procedure adopted by the Third Circuit,[5] as originally developed in the Fourth Circuit, adequately protects indigent defendants from the ineffective assistance of counsel at trial due to the belated appointment of defense counsel to represent them.

In *United States ex rel. Mathis v. Rundle*, 394 F. 2d 748 (3rd Cir. 1968), the Third Circuit Court established a definite standard for the determination of the issue of ineffective assistance of counsel in belated appointment cases. In *Mathis*, defense counsel was appointed to represent the defendant on the night before trial. Despite the short period of time for preparation, the court held the prima facie presumption of denial of effective assistance of counsel due to belated appointment was effectively rebutted. *Mathis* established for the Circuit the rule that belated appointment of counsel is inherently prejudicial and is prima facie a denial of effective assistance of counsel. The burden of proving a lack of actual prejudice is then shifted to the prosecution. The *Mathis* Court relied heavily upon Fourth Circuit decisions in *Fields v. Peyton*,

[4] Neither *Powell v. Alabama*, 287 U. S. 45 (1932) nor *Avery v. Alabama*, 308 U. S. 444 (1940) set procedural guidelines for determining prejudice in belated appointment cases. In *Avery*, the Court held that a denial of the opportunity to confer with the accused and to prepare a defense *could* violate the defendant's right to counsel.

[5] In the state courts and in the District Court, the Commonwealth relied upon *Commonwealth ex rel. Dion v. Tees*, 180 Pa. Superior Ct. 82 at 82, 118 A. 2d 756 (1955) and *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, at 608, 235 A. 2d 349 (1967), which expressly rejected the contention that only a brief opportunity for consultation alone constituted the ineffective assistance of counsel. In addition, as the Court of Appeals points out, the Pennsylvania Supreme Court in *Washington* also expressly refused to place the burden of proof upon the Commonwealth in this type of case. 408 F. 2d, n. 12 at 1190.

375 F. 2d 624 (4th Cir. 1967); *Twiford v. Peyton*, 372 F. 2d 670 (4th Cir. 1967); and *Martin v. Virginia*, 365 F. 2d 549 (4th Cir. 1966).

Clearly the burden upon the prosecution requires adequate affirmative proof that no actual prejudice resulted. The Commonwealth contends that this standard is a severe one and requires a showing of no actual prejudice beyond a reasonable doubt, the identical standard your Honorable Court has adopted in determining whether federal constitutional error can be held to be harmless, *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824 (1967). Where a thorough review of the evidence upon which a conviction was based does not uncover any prejudice to the defendant because his court-appointed counsel was belatedly appointed and allegedly inadequately prepared, the Commonwealth maintains that the defendant has no grounds upon which to base an ineffective counsel claim.

Martin v. Virginia, 365 F. 2d 549 (4th Cir. 1966) clearly sets forth the procedural problem once the allegation is made. *Martin* requires the District Judge, as the trier of fact, to determine whether the danger of prejudice was so great as to warrant a new trial. Each case must stand or fall on its own merit:

> In some instances the court may find that the danger of prejudice arising from the lack of opportunity for preparation is minimal, cf. *Turner v. State of Maryland, supra.* In others even an interval much longer than one day may afford insufficient time for adequate investigation and reflection. *Cf. Edgerton v. State of North Carolina, supra. Martin v. Virginia*, 365 F. 2d at 554.

To hold as petitioner requests that the mere allegation of the belated appointment of counsel warrants a new trial would serve to render void those conviction validly secured

without actual prejudice to a defendant but where trial counsel was appointed at some short period prior to trial, despite the fact that defense counsel appointed months before trial could not have effectuated a different result.

In addition, the adoption of the rule that petitioner propounds would require the setting of specific time periods within which counsel may be appointed prior to trial. To leave the determination of these time period to the states or to the circuits would of necessity require an investigation on an *ad hoc* basis into these time periods in the great avalanche of post-conviction hearings which would necessarily follow such a decision. Thus the individual judge would have to investigate the record and make an individual judgment of the effect of the time period upon trial in each case, precisely what petitioner opposes.

Placing the burden of proof upon the prosecution in any collateral attack where "belated appointment" of counsel is raised is not entirely satisfactory. In effect, this means that counsel who were in an adversary relationship at trial may, in a collateral attack, find themselves attempting to support one another in the tactics employed by one of them. This becomes particularly difficult where a significant percentage of the cases are handled by defender associations. This requires that the District Attorney's Office must oppose the Public Defender's Office at trial and perhaps support its tactics in a subsequent collateral attack. This knowledge is bound to have an effect upon the prosecutor's conduct at trial and ultimately, therefore, upon the adversary system.

Petitioner's reliance upon cases in which your Honorable Court refused to adopt an actual prejudice rule is misplaced. These cases are not apposite to the belated ap-

pointment cases: *Sheppard v. Maxwell,* 384 U. S. 333, (1966) and *Estes v. Texas,* 381 U. S. 532 (1965) (prejudicial publicity); *Glasser v. United States,* 315 U. S. 60 (1942) (representation by counsel of defendants with conflicting interests); *White v. Maryland,* 373 U. S. 59 (1963) and *United States v. Wade,* 388 U. S. 219 (1966) (total absence of counsel at a critical pre-trial stage of the proceedings and at a stand-up).

Consequently, the Commonwealth respectfully requests that your Honorable Court adopt the *Mathis* rule, thereby permitting inquiry into whether or not actual prejudice occurred.

B. The Court of Appeals correctly held that an examination of the trial record supports the district court's finding that no actual prejudice resulted.

Petitioner alternatively argues that if the *Mathis* rule is upheld to be applicable by your Honorable Court as the correct standard in determining prejudice in belated appointment cases, then the circuit court erred in finding that petitioner was not actually prejudiced by the late appointment of counsel. Petitioner contends that actual prejudice can be found in the record or that the record is undeterminative on this point and that an evidentiary hearing is essential.

The Commonwealth contends that the circuit court correctly determined that petitioner was not prejudiced after a careful and complete examination of the trial record which demonstrated that petitioner received a fair trial despite the fact that petitioner met his counsel shortly before trial. Mr. Tamburo, who is "an attorney of great experience in the trial of criminal cases" (A. 266-267), effectively provided petitioner with the assistance of counsel at trial.

Petitioner's arguments that his counsel's failure to file pre-trial motions challenging his arrest, the search of the automobile in which he was a passenger, and the seizure of bullets from his home, lack any relevance in determining whether he was prejudiced since counsel was able to enter objections at trial. Counsel did so here, but was overruled on the merits.[6] The district court and the circuit court specifically reviewed this challenged evidence to determine its admissibility despite trial counsel's failure to file timely motions and found that the evidence was properly admitted.[7]

In addition, petitioner has never asserted that he was precluded from presenting any defense witnesses, such as the alibi and character witnesses who testified for co-defendant Lawson.

Petitioner's further claim, raised initially before your Honorable Court, that his counsel did not have an opportunity to confer with counsel for the co-defendants contains no showing that he was thereby prejudiced. Even if petitioner's counsel had known that Lawson was going to take the stand in his own defense and would have to admit to a second degree murder conviction, petitioner's counsel could not have proceeded in any different manner.[8] This fact alone would certainly not have warranted the granting of a motion to sever. It is also immaterial that counsel did not have the notes of the previous trial in order to impeach witness Kovacich, since the alleged "impeaching" merely clarified the amount of money taken by the robbers and in no way cast doubt upon Kovacich's testimony regarding petitioner's complicity.

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[6] See Sections II and III, *infra*.

[7] See Sections II and III, *infra*.

[8] The Record does not show whether in fact petitioner's counsel was or was not aware of this.

With no allegations of petitioner to be resolved the Circuit Court correctly held that an evidentiary hearing was unnecessary under the doctrine of *Townsend v. Sain*, 372 U. S. 293 (1963).

II. The Search of the Automobile in which Petitioner was an Occupant was Reasonable Since It was Conducted Incident to a Lawful Arrest Though Momentarily Later at a Place which Provided Safe Conditions for Police Officers.

A. The record shows probable cause for petitioner's arrest where petitioner fit the description of one of the gunmen and the automobile in which petitioner was riding, which matched identically the description as to style, color and occupants, the automobile seen at the robbery site under suspicious circumstances, attempted to elude police officers.

Petitioner contends that the police officers who arrested him lacked probable cause to do so, citing *Beck v. Ohio*, 379 U. S. 99 (1964). The Commonwealth does not challenge the holding of *Beck*, because clearly here the record shows that the arresting police officers had sufficient probable cause to arrest petitioner.[9] These facts and circumstances were brought out at trial and the trial judge had ample opportunity to rule upon the legality of the arrest.[10]

The record shows that the facts within the knowledge of the *arresting* police officers were as follows:

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[9] The District Court found "that these facts and circumstances formed the basis for probable cause and a legal arrest." 281 F. Supp. at 99-100 (A. 312). The Court of Appeals affirmed the District Court without discussion on this point. 408 F. 2d at 1192 (A. 320).

[10] It is immaterial that petitioner's trial counsel did not file a Motion to Suppress with regard to the arrest since the lower court had ample evidence and opportunity to evaluate the arrest. Consequently, petitioner's right to the effective assistance of counsel was not tampered by the late appointment of counsel in this regard.

On May 20, 1963 at approximately 11:45 P. M., Gulf Service Station attendant Stephen Kovacich was approached by two Negro men on foot at a gas pump island on the station premises in North Braddock, Pennsylvania. The Negro men displayed guns and forced the attendant inside the station office where they ordered him to give them money from the cash register and from a back room (A. 54-55). One of the robbers was wearing a green sweater and the other a light-colored trench coat (A. 57).

At approximately the same time, two young teenage residents of the area were taking a walk (A. 39). They noticed a light blue station wagon parked in a Kroger's parking lot right across the street from the service station (A. 40-42). The automobile was occupied by four Negro men, one of whom was wearing a green sweater and another a light-colored trench coat (A. 43). The teenagers observed the automobile circling the block several times (A. 41). A shout was heard indicating that a robbery had just occurred at the gas station. Immediately thereafter, the teenagers observed the station wagon pull out of the Kroger's parking lot at a high rate of speed, approximately 45 to 50 m. p. h. (A. 41, 52).

Within an hour, Swissvale police officers Herman and Hagan observed a light blue station wagon with four Negro occupants in a neighboring Borough (A. 71, 77). The two police officers were driving separate patrol cars and attemped to stop the station wagon on the main thoroughfare as soon as traffic conditions ma[illegible] the stop feasible and safe. One patrol car, with its red light flashing, came up parallel to the vehicle and attempted to force the vehicle off the road. At this point, the vehicle veered sharply to the right, turning into a side street in an effort to elude police officers. One police officer was able to negotiate the

turn and followed the station wagon to a parking lot at the end of the street (A. 71). The other police officer was able to turn his patrol car at the next side street and arrived at the parking lot within moments (A. 78). When the police officers arrived, the four Negro occupants of the vehicle were already out of the station wagon (A. 72).

Within minutes police officers from Rankin and North Braddock arrived at the scene. Petitioner was observed to be wearing a green sweater; a light-colored trench coat was seen on the seat of the car (A. 86). At this point, the men were patted down for weapons, were taken into custody, and were escorted to various police stations.

The Commonwealth contends that on the basis of the information that a robbery had occurred, that the robbers were Negro men one of whom was wearing a green sweater and the other a light-colored trench coat, of the suspicious actions of the light blue station wagon parked in a nearby lot at that late hour, with the additional facts of the car encircling the block many times and then departing at a high rate of speed in a residential area immediately after the robbery, that two of the occupants matched the description of the robbers, and an automobile matching this description wherein the petitioner was a passenger attempting to elude police officers establishes clearly that the police officers had probable cause to make an arrest of the petitioner. In addition, petitioner's physical coloring and attire matched perfectly the description given by the hold-up victim.

The Commonwealth does not contend that an arrest was not made until the petitioner was taken to the police station or until after the fruits of the crime or weapons were found or that the apprehension at the parking lot was a

mere "stop" rather than an arrest as was argued in *Terry v. Ohio*, 392 U. S. 1, 88 S. Ct. 1868 (1968).

Rather, the Commonwealth concedes that the arrest took place at the parking lot after the police officers approached the occupants of the eluding vehicle and searched their persons for weapons. The arrest occurred when North Braddock police officers investigating the robbery took the petitioner into custody moments later.

Clearly, petitioner was entitled to the protection of the Fourth and Fourteenth Amendments at this moment, the moment the arrest was made. *Beck v. Ohio, supra.* The reasonableness, however, of the government's invasion of his personal security in this particular situation is amply based upon and supported by the facts set forth above.

Petitioner alleges that there was no information connecting the automobile to the robbery and that when he was apprehended, the automobile in which he was a passenger was heading in the direction of the robbery. The Commonwealth contends that while arresting police officers had no direct and positive evidence that the robbers escaped by means of this particular automobile, the extremely suspicious actions of an automobile at the scene of the robbery matching the description of the apprehended vehicle raised inferences which conscientious law enforcement officers could not ignore. Most important, the description of the robbers given by the holdup victim as to coloring and dress identically matched one of the automobile's occupants, petitioner. It is immaterial that the automobile was heading in the general direction of the robbery site since the Commonwealth does not now, nor did it at trial, contend that the occupants were attempting to escape when first

spotted by Swissvale police.[11] It was the Commonwealth's theory at trial that since approximately one hour had elapsed between the robbery and the apprehension, the occupants were not in the process of escape but were returning to their homes.

The only factual consideration is whether at the moment of arrest the police officers had within their knowledge reasonably trustworthy information to warrant a man of reasonable caution in the belief that a robbery had been committed and that petitioner was indeed the man who had committed the robbery. *Carroll v. United States,* 276 U. S. 132, 162 (1965); *Beck v. Ohio, supra; McCray v. Illinois,* 386 U. S. 300, 304 (1967).

Swift action was mandated here in an attempt to prevent the escape of the robbers and the destruction of what is both the evidence of petitioner's guilt and the property of the gas station.

The lower court correctly held that there was probable cause for petitioner's arrest.

B. The search of the vehicle and seizure of the instrumentalities and fruits of the crime found therein were reasonable since the search was conducted incident to a lawful arrest.

Petitioner challenges the admission into evidence of items found in an air vent on the passenger side of the automobile beneath the dashboard, claiming that the search which uncovered these items was unreasonable. The items in question[12] which were identified at trial were two re-

[11] The automobile was not apprehended in the close proximity of the gas station. When stopped, the vehicle was merely heading in the overall general direction of the Borough in which the holdup had occurred (A. 75).

[12] Although the decision of the Circuit Court discusses only the two revolvers found in the automobile, it is assumed that all of the items seized at the same time and which were identified at trial were intended to be included in the decision.

volvers, a glove full of change in the amount of $34.79, several driver's licenses, operator's licenses and various other cards.

Initially, the Commonwealth wishes to point out that it is not challenging the standing of petitioner to contest the lawfulness of the search. While the evidence shows that petitioner was neither the owner or the driver of the vehicle, the record affirmatively establishes that he was a passenger. The Commonwealth will assume arguendo that petitioner has standing to challenge the search and will limit its argument to the reasonableness of the search.

The record shows that petitioner's arrest occurred at approximately 12:30 A. M. in a parking lot at the end of a street. Also taken into custody were three other occupants of the vehicle who were suspected of participating in an armed robbery less than an hour before. Police officers frisked petitioner and his companions for weapons.

No actual search of the automobile was conducted at this time. Police officers merely looked inside the windows of the vehicle (A. 79). If any search of the vehicle is said to have occurred at this time, then the "search" can only be characterized as an open view visual check of the station wagon in a dark parking lot in the middle of the night.

Because of the dark lighting and surroundings and because of the great risk of escape and the danger to the safety of the police officers, the decision was made to transport the four men to the police station separately and to search the automobile at the police station where better lighting was available (A. 87). Co-defendant Lawson, the admitted owner of the vehicle, drove the automobile to the police station, accompanied by petitioner and a police officer, and parked the vehicle in the station driveway (A. 89).

Immediately upon the arrival of the vehicle at the police station Officers Wagner and Cassidy began to search the vehicle. For an apparently unexplained reason, the search was momentarily interrupted. The police officers entered the station for a very short period of time and then returned to continue the search. At this time the officers discovered the items in question secreted in the air vent duct (A. 90, 107).

The Commonwealth earnestly contends that the legality of the search must be sustained as it was conducted incident to a lawful arrest. *Ker v. California*, 374 U. S. 23 (1963). The Commonwealth contends that only one search of the vehicle was actually conducted. This search occurred at the police station while the car was parked in the station driveway. It is immaterial that the search was interrupted and the items found during the second half of the search. Only one search occurred despite the brief interval while police officers entered the station.

If the search is incident to a lawful arrest, then petitioner's objection that the searching officers did not obtain a warrant is without merit. Since the Fourth Amendment's protections are applicable here, *Mapp v. Ohio*, 367 U. S. 643 (1961), police officers must obtain a warrant whenever practicable: *Katz v. United States*, 389 U. S. 347 (1967), *Beck v. Ohio, supra*. However, the Commonwealth contends that the necessity of swift and safe police action in view of the time of night of the arrest and the dark surroundings warranted the search at the police station as incident to the lawful arrest.

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Cooper v. California*, 386 U. S. 58, 62, 87 S. Ct. 788 (1967),

citing *United States v. Rabinowitz*, 389 U. S. 56, 66, 70 S. Ct. 430, 435.

Nonetheless, the search must stand the test of reasonableness. The Commonwealth maintains that the search meets this test since it took place substantially at the time of the arrest and while it did not take place at the location of the arrest, emergency circumstances necessitated that the search be held at a well-lighted area which was safe for police officers.

Petitioner's contention rests upon *Preston v. United States*, 376 U. S. 364, 84 S. Ct. 881 (1964). The Commonwealth maintains that *Preston* is not controlling. The Court of Appeals agreed with this position.

Preston can be distinguished from the facts of the instant case. Preston was arrested on a minor charge of vagrancy and the offense charged did not bear any reasonable nexus to the search of his automobile. In addition, the vehicle was searched long after it was taken to the police station. The Commonwealth contends that the time difference in *Preston* and in the instant case is important in this regard: that the short lapse of time between the arrest and search in the instant case is indicative that the search occurred "incident" to the arrest.

As regards the place where the search was made, the police station, the Commonwealth contends that the police station area was the only place where the search could have been conducted safely. After the arrest, Lawson, accompanied by petitioner and a police officer, drove the automobile to the station. At trial, Lawson stated that the dimly-lit parking lot where they were apprehended adjoined a bar where their friends met (A. 171). Certainly, the police officers could have been placing their lives in danger if they attempted to search the vehicle at

the parking lot, not only danger from petitioner and his companions, but from their friends inside the bar. While it is true that the petitioner did not have ready physical access to the automobile while it was being searched at the police station, this factor alone is insufficient to prove the search unconstitutional. See Mr. Justice White's dissenting opinion in *Chimel v. California,* 395 U. S. 752, 89 S. Ct. 2034 (1969).

The Commonwealth urges that your Honorable Court approve the principles of *United States v. Dento,* 382 F. 2d 361 (3rd Cir. 1967), *cert. denied,* 389 U. S. 944, 88 S. Ct. 307 (1967), upon which the District Court and the Circuit Court relied.

Dento deals with the search of a car made at a New Jersey State Police barracks following the defendant's arrest on a main highway. For reasons of safety and convenience, the State Police drove the car from the highway to their barracks before searching it. The evidence seized in that search was counterfeit bills and the crime involved was attempting to pass counterfeit bills. The search was held to be incident to a lawful arrest. *Cf. United States v. Bennett,* 415 F. 2d 1113 (6th Cir. 1969).

Wood v. Crouse, 417 F. 2d 394 (10th Cir. 1969), which petitioner cites, abandons the reasonableness test in forcing police officers either to search the automobile in dangerous circumstances or to secure a search warrant before conducting any perusal.

The instant case parallels *Dento.* Petitioner was arrested within an hour of his having committed an armed robbery. The arresting officers frisked the petitioner and the other occupants of the car. Since they did not find any weapons on the felons, they reasonably believed them to be concealed in the car. Since it was dangerous

for the officers to search the car at the scene of the arrest, there being four suspects to be guarded in a dark parking lot, the car was driven by its owner to the police station where it was searched and the evidence found. Surely the officers were justified in taking reasonable safety precautions which necessitated moving the car. These precautions should not render unconstitutional a search otherwise reasonable and incidental to the arrest.

The Commonwealth urges your Honorable Court to disregard *Wood* in a determination of the instant case and to affirm the principles of *Dento*.

III. The Admission into Evidence of Revolver Shells Seized in Petitioner's Apartment During a Search Conducted Pursuant to a Warrant which did not List Shells as Being Among the Items to be Seized was Legal or Alternatively, Constituted Harmless Error.

The petitioner contends that .38 caliber bullets found during a search of his apartment should not have been admitted into evidence since the warrant did not list bullets as being among the items to be located. An objection was raised by defense counsel at trial on this basis. This objection was overruled by the trial judge because he found that there was reasonable ground for making a search in addition to the failure of defense counsel to file a timely motion to suppress the evidence (A. 130-131).

The record discloses that at 9:30 A. M. on May 21, the day of the arrest, North Braddock police officer James Heverly received a search warrant authorizing a search of petitioner's home (A. 126). Officer Heverly located one brown leather holster and a box of .38 caliber Smith and Wesson shells containing 33 shells of the short variety. In addition, approximately 45 additional shells of the long

variety, .38 caliber, were located. Many of these shells were of the dum-dum variety, which according to Officer Heverly cause a larger hole upon exit than upon entry (A. 128). This simple explanation was given solely for the purpose of clarification and could not be deemed inflammatory or prejudicial per se. Officer Cassidy then identified bullets which he located in the revolvers found inside the automobile in which petitioner had been a passenger prior to arrest. He identified four .38 long dum-dum bullets and two empty long cartridges, and five .38 caliber short bullets (A. 132-133).

Unfortunately, the search warrant and supporting affidavit, which were available at trial, have been lost and were not introduced at either the State or Federal habeas corpus hearing. The Commonwealth concedes as it did before the Court of Appeals, that the warrant did not list the bullets as being among the items to be located (TT. 203). However, the Commonwealth maintains that the seizure of the bullets was lawful or alternatively that the admission of the revolver shells into evidence constituted harmless error.[13]

The Appellate Courts of Pennsylvania and the United States Court of Appeals for the Third Circuit have long held that items related to the purpose of the search may be seized even though not specifically named in the warrant. *Commonwealth ex rel. Stoner v. Myers*, 199 Pa. Superior Ct. 341, 345, 185 A. 2d 806, 808 (1962), *allocatur denied; United States v. Joseph*, 174 F. Supp. 539 (E. D. Pa. 1959), *aff'd per curiam*, 278 F. 2d 504 (3rd Cir.), *cert. denied*, 364 U. S. 823 (1960); *United States ex rel. Stoner v. Myers*, 329 F. 2d 280 (3rd Cir. 1964); *United States ex rel. v. Banker v. Maroney*, 210 Pa. Superior Ct.

[13] The Court of Appeals (A. 332) and the District Court (A. 312) held to this effect, relying upon *Chapman v. California*, 386 U. S. 18 (1967).

702, 231 A. 2d 323 (1967), *allocatur denied.* See also *United States v. One 1965 Buick,* 992 F. 2d 672, 679 (6th Cir. 1968); *Gurleski v. United States,* 405 F. 2d 253 (5th Cir. 1968), *cert. denied,* 395 U. S. 981 (1969).

The warrant specifically identified articles taken in the armed robberies which the officers were investigating. The .38 caliber bullets were intimately related to the offenses charged, to armed robbery.

The search conducted was not a general search such as those condemned in *Berger v. New York,* 388 U. S. 41, 87 S. Ct. 1873 (1966), *Stanford v. Texas,* 379 U. S. 476, 85 S. Ct. 506 (1964) and *Marron v. United States,* 275 U. S. 192, 48 S. Ct. 74 (1927).

Assuming arguendo that the revolver shells were improperly admitted into evidence, the Commonwealth contends that the admission of these bullets was harmless error. This conclusion is amply supported by the record, which indicates that petitioner's guilt is clear and convincing. Petitioner was positively identified in court by the victim as one of the two robbers, and the one who brandished a nickel-plated .38 caliber revolver. The victim was a former police officer and he was able to identify one of the guns found in the car in which petitioner was a passenger as appearing to be the gun that was used in the robbery of his gasoline station.

The victim had a good opportunity to observe closely the facial features of the robber. The victim testified that he identified petitioner at a lineup approximately one week after the robbery. Various cards, such as an operator's license, were identified by the victim as having been taken from him during the robbery.

With regard to the robbery which occurred May 20, 1963, the victim testified that one of the robbers was wear-

ing a green pullover sweater. The victim identified petitioner as one of the robbers the day after the robbery but was unable to make a positive identification at trial because, as the victim explained, petitioner was dressed differently, was now wearing glasses and had shaved his mustache (A. 79). Petitioner was apprehended less than an hour after the robbery in a light blue station wagon which matched the description of the station wagon which had been seen circling the area shortly before the robbery under suspicious circumstances. One of the occupants of the car was wearing a green sweater. A search of the automobile in which petitioner was a passenger revealed the presence of a glove used to carry change from the gas station and guns which were identified by the victim as resembling the robbers' guns.

In light of the extensive testimony of eye-witnesses that petitioner had participated in various armed robberies, it certainly cannot be seriously contended that his conviction rested upon the admission of the .38 caliber bullets located at his home.

Your Honorable Court has considered the harmless error doctrine in light of the proscription of the Fourth Amendment. *Bumper v. North Carolina,* 391 U. S. 542, 88 S. Ct. 1788 (1968). The Appellate Courts of Pennsylvania and various Circuit Courts have applied the harmless error rule in cases involving the Fourth Amendment. *Commonwealth v. Pearson,* 427 Pa. 45, 233 A. 2d 552 (1967), *United States v. Ramseur,* 378 F. 2d 902 (6th Cir. 1967); *Thompson v. United States,* 382 F. 2d 390 (9th Cir. 1967).

Therefore, it is the Commonwealth's contention that if the search is held to be illegal, the admission of the shells is merely harmless error in light of the overwhelming evidence of petitioner's guilt.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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